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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN D. TURNER

Petitioner

versus

Financial Corporation of America

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioner
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QUESTIONS PRESENTED

In a summary judgment proceeding did the Ninth Circuit err when holding,

> "Reliance by investors, on publicly available information is presumed for purposes of a rule 10b-5 action."

And if an investor trading in the market is constructively on notice of media stories he did not read then did the lower courts err by weighing the evidence in this case when deciding to grant and uphold summary judgment barring Petitioner from his day in court before a jury on the merit?

When an individual investor relies primarily upon 10-K and 10-Q reports in making his investment decisions is it error for the court to grant summary judgment based substantially upon its holding that selected media stories gave the marketplace, and thus, constructively the individual, a true picture of a company's financial condition?

PARTIES TO THE PROCEEDING

AND RULE 29.1 LIST

Petitioner is John D. Turner.

Respondents Are:

Financial Corporation of America, A Delaware Corporation; American Savings and Loan Association, A California Corporation; William J. Popejoy; Victor H. Indiek; Merril Butler; Robert M. Barton; Thomas P. Kemp; Annelise G. Anderson; J. Ralph Stone; Charles E. Young; Edwin L. Johnson; Lawrence K. Roos; Donald E. Royer; Niel N. Stolz; Peat Marwick, Mitchell & Company; Does 1 through 99.

The Federal Deposit Insurance Corporation entered this case as receiver for American Savings and Loan Association in September, 1988.

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Petitioner

——v.——

FINANCIAL CORPORATION OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner John D. Turner respectfully petitions for a writ of certiorari in the above entitled matter citing the overriding national interest in having a consistent application of securities law throughout the district and circuit appellate federal

courts. And a consistent application of the standards to be applied by the lower courts in granting summary judgment.

Petitioner John D. Turner respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit which upheld an order of the United States District Court, Northern Division, granting of summary judgment to respondents and dismissing this action.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a-21a)[1] is not reported. The Opinion of the Court of Appeals, denying a petition for rehearing. (App. 22a) is not reported.

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[1] References to "App." are to the Appendix submitted with this petition.

The opinion of the United States District Court for the Northern District of California granting summary judgment to Respondents (App. 25a-51a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1992 (App. 23a) Rehearing was denied in a split decision by an order dated April 1, 1992 (App. 22a). This Court's jurisdiction is invoked pursuant to 28 U.S.C.§ 1254(1).

STATUE AND RULES INVOLVED

The statue and rules involved in the proceeding are section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j; Rule 10b-5, 17 C.F.R. § 240.13c101; and Rule 56, Federal Rules of Civ. Procedure (App.235a-238a)

STATEMENT OF THE CASE

This individual action, alleging violations of Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5, violations of RICO 1961-1968, and common law violations was commenced in April, 1988 against Financial Corporation of America, ("FCA") a Delaware Bank Holding Company and certain of it's corporate officers and directors of both FCA and American Savings and Loan of Stockton, ("American") a 98.5% wholly owned subsidiary of FCA.

FCA was listed as a Fortune 500 Company at all times during the periods covered by this action.

Petitioner's complaint alleged that Respondents led by Popejoy, who took over as the Chief Executive Officer of American and FCA in August 1984, discovered in the last half of 1984, through November of 1985 that a significant portion of the company's

loan receivable and its investment assets were generated through a general practice of fraud and were improvident and likely to cause continuing losses to the company.

Petitioner claimed that rather than report these findings to the S.E.C., the market and the shareholders, Respondents led by Popejoy filed false and misleading 10-K and 10-Q reports with the SEC for 1985, 1986 and 1987, which reports Petitioner relied upon in making his investment decisions.

Respondents claim they reported, by providing for the financial impact of these discoveries, when they set aside $422 million for loan loss reserves for year-end 1984.

Petitioner alleged that there was no disclosure by respondents of the general practice under the former management of FCA to originate assets through fraudulent practices. And that this hard fact was a

material fact that any reasonable investor would want to consider before making an investment decision in respect to this troubled company which was represented by respondents, led by Popejoy, as a turn around Company on track to full recovery.

Petitioner also alleged that a significant portion of the losses FCA experienced were from these phantom assets, and that the actual losses were far in excess of $422 million. In fact as high as $4 billion dollars. Yet these assets were being carried as solid assets to comprise a significant portion of the $14.9 billion dollars FCA reported as loan receivable assets in its 1985 10-K.

Petitioner presented probative evidence that Financial Corporation of America ("FCA") was insolvent at all times during this period. The San Francisco Federal Home Loan Bank (SF-FHLB) had in their files (of significant case writeups)

that the FCA case was expected to cost the Federal Deposit Insurance Corporation ("FSLIC") $4 billion dollars to resolve.

Yet at this same time FCA was progressively reporting net stock-holder equity up from $229.7 million progressively up to $320 million during six successive quarters from year end 1985 through June 1987, in their 10-K reports to the SEC.

Petitioner Turner accumulated 90,000 shares trading on the New York Stock Exchange during this period beginning April 23, 1986 through April 14, 1987, at an average price of $9.07 per share and a total cost of $816,125.

In 1988 FCA's primary asset, American Savings, was seized by the FHLBB and turned over to the FSLIC as receiver. American was immediately sold in a pass through sale to Robert Bass and the FHLBB reported that FSLIC would lose $1.7 billion after factoring in that the FHLBB kept a 30%

interest in the new entities which were New West Savings and the new American Savings.

Respondents filed motions to dismiss Petitioner's complaint. Petitioner answered and a short hearing was held in which the district court told petitioner:

THE COURT: "Why are you here? Why don't you leave it to the attorneys in Los Angeles who are litigating on behalf of the class? I am not going to try a parallel action up here when there is one down in L.A." P4-L16

The court then turned the motions to dismiss into a summary judgment procedure instructing that petitioner Turner be deposed by respondents to flesh out his claims and to search Lexis and Nexis reports to see what was in the media about FCA and to come back with motions "recharacterized" as motions for summary judgment.

On May 7, 1990, the District Court granted respondents' motion for summary judgment dismissing this action in its entirety. On February 21, 1992, the Ninth Circuit upheld the District Court's grant of summary judgment.

A. THE FACTS

As set forth in the opinions of the Courts below, the pertinent facts are as follows: The District Court's Memorandum and Order held that:

"Charles Knapp resigned and was succeeded by William Popejoy as Chief Executive Officer of American in August 1984. Popejoy engaged an independent task force to determine the adequacy of loan loss reserves for the loans created during the period of Knapps management. "Such loans were alleged to have been made under inadequate or fraudulent banking practices". Upon completion of the task

force's review the loan loss reserves were increased by $422 million. This fact was reported in FCA's 1985 10-K submitted to the SEC on March 31, 1986. The 1985 10-K report also revealed that periodic reviews of the loan loss reserves would take place. The 10-K mentioned the ongoing litigation resulting from Charles Knapp's loan making activities during his tenure at American." (App.27a)

The Ninth Circuit Memorandum held that: "Before buying stock in 1986, Turner reviewed FCA's 1985 10-K, which revealed several financial problems: 1) Loan loss reserves had been increased by $422 million as of the end of 1984 and $182 million as of the end of 1985, 2) the loan portfolio was being investigated, and 3) FCA was being sued in various shareholder class action suits arising out of the activities of the management which headed the company

until 1985. Those suits were subsequently settled for between $32 and $42.7 million. Several stock reporting services, including one that Turner subscribed to, reported FCA as a "risky investment," giving it the lowest safety rating." (App. 3a)

B: THE DISTRICT COURT'S DECISION

Page six (6) of the District Court's Decision the court states "From the numerous exhibits submitted, it appears that the information available in the marketplace, both before and during Plaintiff's purchases, was sufficient to give plaintiff an accurate picture of FCA's financial condition. Two of FCA's alleged omissions were reported by prominent financial publications prior to and during the time plaintiff purchased stock. The fact that American was the subject of a takeover, or that a buyer was being sought for it, was well documented in the press.

The remaining two omissions alleged by plaintiff, pertaining to the understated amounts of loan loss reserves and fraud mentioned in FCA's proof of loss statement, may also be deemed immaterial amidst the amount of information available concerning FCA's financial condition and history. (App.34a)

C: THE COURT OF APPEALS DECISION

The Ninth Circuit held:

"The statements that Turner claims are materially misleading are Popejoy's opinions or belief's regarding the present and future of FCA. That kind of statement may be actionable if knowingly false...Even if we assume that the statements were knowingly false, Turner's claim fails because he was exposed to such a morass of contrary information that it was not reasonable for him to rely solely on Popejoy's optimistic statements as evidence

that all the other available information was inaccurate ...Reliance upon publicly available information is presumed for purposes of a Rule 10b-5 action...The causal connection between Popejoy;s statements and Turner's purchases and losses is missing in this case. At the time of Popejoy's statements, the papers were filled with news of FCA's financial difficulties and its previous unsound lending practices. In 1985 the New York Times called FCA "the most explosive, speculative stock on the New York Exchange." (App. 8a-10a)

Citing points of material fact overlooked in the memorandum of decision Turner petitioned the Ninth Circuit Panel for a rehearing. Judge Noonan voted to grant the petition, Judges Nelson and Fernandez voted not to grant the petition. Final Judgment was filed April 23, 1992. (App. 22a-23a)

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS ERR WHEN HOLDING AN INDIVIDUAL CONSTRUCTIVELY ON NOTICE OF MEDIA STORIES HE DID NOT READ.

The standards applied below are essentially "caveat emptor", creating an unworkable standard, not justified by policy or precedent and, as here likely to result in an unjust decision.

This is an error in application of the standard adopted in TSC where this court held the general standard of materiality is full disclosure, and not "caveat emptor", to the "reasonable investor". The TSC standard, expressly adopted by the U.S. Supreme Court in Basic v. Levinson, 485 U.S. 224 (1988), defined materiality as facts where there is:

"a substantial likelihood, that, under all the circumstances, the omitted fact would have assumed actual significance in

the deliberations of the reasonable shareholder. Put another way there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." TSC Indus. Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

FCA's very survival depended on its assets. The rule of this court is that Turner be informed of all material facts that a reasonable risk taker would want to consider before taking a risk.

A. THAT A COMPANY'S ASSETS WERE GENERATED IN A GENERAL PRACTICE OF FRAUD IS MATERIAL INFORMATION.

Media stories that warn that FCA has a large number of foreclosed property and non performing assets is NOT a disclosure that FCA had a large number of assets which were

generated under a general practice of fraud. Especially when FCA continued a steady stream of reports delineating these losses as due to economic conditions in oil patch and agricultural communities. (App. 79a; 216a)

Petitioner does not argue that investment in FCA stock was not risky. The question was: what was the risk? Was it economic or was it economic, compounded by fraud so pervasive that the company was always insolvent if the facts were told.

Any investment in a turn around company is a special class of investment representing a special risk. But to hold that FCA's true financial condition was known to the market place from media stories requires that the market be aware of the following probative evidence submitted by Petitioner Turner. Which, incredibly, the lower courts rationalized away as immaterial: (App. 191a-198a)

a) Secretly there was a known $2 to $3 billion hole in the FCA/American by both the Federal Home Loan Bank Board (FHLBB) and the San Francisco Federal Home Loan Bank (SF-FHLB) during the time that Turner was buying stock and during which time the company was reporting on its 10-Q and 10-K reports rising net assets each quarter. FCA reported net stockholder equity of $229.7 million December 31, 1985 with each quarter increasing to $276.2, 284.8, 293.6 million respectively and 313.9 million December 31,1986 Then 320 million as of May 11, 1987.

b) The FHLB-SF had in its files a significant case writeup estimating a cost to the FSLIC of $4 billion dollars to resolve the FCA Case during the year Turner was buying stock in a company he thought was told had stockholder equity of between $229 and $320 million and was improving each quarter.

c) The Respondent Officers and Directors were secretly indemnified by the FHLBB in 1985, against loss from serving as officers or on the companys' board of directors, and those indemnification agreements were not disclosed to the shareholders at any time.

d) In November 1989 the chairman of the Federal Home Loan Bank, M. Danny Wall, testified under oath before the house banking committee that when he took over as chairman in June of 1987 he discovered that American had a known $2 to $3 billion dollar hole in it, was being run out of the FHLBB's offices in Washington D.C., and that he immediately began to undo that.

Respondents submitted a total of six media stories. Not only do these stories not disclose the above they do not even hint of it. Nor do they disclose at a time when petitioner bought stock He was buying stock in a company whose loan portfolio was

comprised of assets, a significant portion of which were generated under a general practice of fraud. These assets were so impaired that no amount of effort could turn them into solid assets. (App 92a-131a)

Unless the phantom assets, (originated through the fraud and improvidence outlined in the "Proof of Loss"), were counted as solid assets and a part of FCA's $14.9 billion dollar loans receivables FCA was always insolvent by several billion dollars. (App. 163a-190a)

After extensive hearings a report was released April 9th., 1987 by the Sub-committee On Oversight and investigations of the Committee of Energy and Commerce U.S., House of Representatives, exploring the activities of the FHLBB in connection with enforcing securities laws. Petitioner presented the report as evidence.
"The subcommittee found that the FHLBB has engaged in a persistent pattern of inaction

and non-enforcement, and, when that was not enough, in deliberate actions which culminated in misleading financial reports and apparent violations of securities laws." (App. 229a-234a)

Common sense is insulted when such evidence rationalized away. Further, the Lower Court's confusing Media Mix Theory of disclosure leads to an impossible situation where no investor could ever rely on any SEC required report without being constructively on notice of everything ever written or spoken in any media channel.

This would be an impossible standard to meet and would effectively do away with the need for any SEC report, replacing it with a media mix report. To accept this standard means that no investor could rely upon anything reported in a 10-K form without knowing everything ever written in all major media channels as a delimiter.

As in this case, this standard leads to a quagmire of whose interpretation is correct of what the media mix is comprised. It would be a field day for litigation attorneys and experts but not effective for a fair and honest securities market.

Further such a standard is an improper legislation by the court that dispenses with the process instituted by congress and expressly provided as a medium an investor is entitled by law to rely upon, i.e. the SEC 10-K and 10-Q report.

The standard for requiring truth is higher in a 10-K or 10-Q which requires reporting the hard facts -- whereas media reports are comprised of soft information and the opinion of the writer. Further the media is notoriously unreliable and not generally liable to an investor, under SEC laws, for reporting errors.

In Aaron v. SEC, Justice Blackmun stated "I have no doubt that the "mischief" -

confronting congress in 1933 and 1934 included a large measure of intentional deceit and misrepresentation. The concern, however, ran deeper still, and congress sought to develop a regulatory framework that would ensure a free flow of honest, reliable information in the securities markets. This court has recognized that it was congress' desire to "substitute a philosophy of full disclosure for the philosophy of caveat emptor," and to place upon those in control of information the responsibility for misrepresentation. (citations omitted)" Aaron v. SEC, U.S. 446 at 706-707

Adopting a standard requiring an investor to beware of media stories is essentially a standard of caveat emptor rather than this courts TSC rule requiring full disclosure in an appropriate forum such as a 10-K company release. Further, reasonable minds could differ on what even

the few selected media stories disclose.

Financial Corporation was officially touted as a turn around company by Respondent Popejoy, its Chief Executive Officer, in a September 22, 1986 article in American Banker where he stated:
"We're out of harms way in my estimation" he said. "There's no longer any talk of American Savings [Financial Corp.'s savings and loan subsidiary] failing. It's just how long it will take for this company to fully regain the financial prominence it did prior to the FCA First Charter Merger in 1983."

This article was reprinted and sent out to shareholders as an official FCA Press Release on October 28, 1986 where shareholders were told:
"We thought you'd be interested in Bill Popejoy's recent interview although we'd like you to know that the FCA news release contains updated information that was not

available at the time of the interview. In particular , please note that FCA has now produced five consecutive quarters of profitability, and that American Savings' regulatory capital has increased to $527.6 million..." (App. 132a-162a)

To hold that such statements in an official Company press release by the Chief Executive Officer of a turn around company would not influence the decision of an investor or speculator to trade defies common sense. Further this was released in October 1986, a full year later than the two October 1985 New York Times articles, and three months later than the last article which the lower courts allege constructively warned the Petitioner of FCA's true financial condition. (App. 92a-131a)

The District Court's rulings rationalize away the above as immaterial to petitioner Turner by a finding that:

"Plaintiff has offered no proof indicating that Popejoy made those statements under such circumstances. "General statements of optimism are ordinarily not actionable as 10b-5 material misrepresentations unless it can be shown that the speaker had no reasonable basis for making the statement or was aware of some undisclosed facts. (Citation omitted) Moreover, such statements are incapable of being branded as material misrepresentations since there was an abundance of public information detailing FCA's financial condition."

The Ninth Circuit held that:

". . . in making his optimistic statements Popejoy may have really believed what he was saying was true." (App. 9a)

The courts first hold that Turner had no reasonable basis to believe Popejoy because of information in the marketplace. Then hold that Popejoy may have reasonably believed what he was saying. Yet Popejoy

had all the same market information as Turner - plus he had inside information that a significant portion of the companys' assets were generated in a general practice of fraud expected to cost the FSLIC $4 billion dollars. Popejoy had no reasonable basis for making such claims since he knew what Turner and the market did not know.

This is only one of many instances of the courts below wrongly viewing evidence in a light most favorable to the party moving for summary judgment.

Further, Turner did not rely solely on Popejoy's optimistic statements. His statements were only part of a composite of all the company's reports which misled not only Turner, but also the market.

This conflict between the materiality standards of this Ninth Circuit ruling and the standards this court set forth in TSC presents an issue of major importance in the orderly administration of the federal

securities laws. Uncertainty respecting what defines materiality resulting from the decisions below should be clarified by this court. This case presents an opportunity to clarify this issue in a framework provided by an individual investor trading in the market in reliance on 10-K reports. A majority of cases addressing this issue have been class action cases.

II. THE DECISIONS BELOW DIRECTLY CONFLICT WITH THE FRAUD UPON THE MARKET THEORY WHICH HAS BEEN ADOPTED BY THIS COURT AND EIGHT OF THE CIRCUITS WHO HAVE ADDRESSED IT.

The standard established by the courts below cannot withstand careful scrutiny.

This court, and all circuits to address the issue, had already certified a market expert to instruct the district court as to what the media information meant. That expert was the secondary market for securities made by the New York

Stock Exchange. It was the best arbiter of what the total mix of media information about FCA meant. In this case it meant that based upon all positive and negative public information the stock was worth the asking price and the price paid.

In trading on the New York Stock Exchange Petitioner Turner can be said to have relied upon the integrity of the market in certain basic assumptions.

1) That there was a market for the security at the price offered and sold.

2) That the market knew of no reason why the stock was not worth the asking price.

3) That, the efficient market had assessed all public information, in valuing FCA stock at the price he paid.

4) That he was trading in an honest market.

If it was not unreasonable for the market to value FCA stock at the market price based upon all public information

including all negative media then it cannot be unreasonable for Turner to have valued it at the market price he paid when he purchased in the market. And the lower court commits serious judicial error when it grants summary judgment and supports that order by weighing selected soft media story evidence and subjectively holding what a limited number of media stories constructively disclosed to Turner. "Under the fraud on the market theory, which has been adopted by every court (including eight courts of appeal) to address it, it is presumed that every material corporate misstatement was reflected in the market price of the security and that investors, in making a decision to trade, relied upon the integrity of the market price and thus relied indirectly upon the misstatement." SEC Amicus Brief page 2 (1987) Basic v. Levinson, 485 U.S. 224.

The Ninth Circuit led in the development of the fraud on the market theory with Blackie v. Barrack, 524 F.2d (1975). This Court has since firmly established that the securities market is not comprised of fools and that in a well defined market -- that market has absorbed all available public information and has intelligently reflected it in the price of the security being traded.

In Turner vs FCA the lower courts reverse Blackie and overrule the U.S. Supreme court by in effect holding that Petitioner Turner, who bought at the market price, was unreasonably purchasing in light of what the lower court decided the media reports and the 1985 10-K, were telling him, and by inference telling the market.

In arriving at this conclusion Judge Marilyn Patel sitting in the district court solicited the defendants to search and provide the court with Lexis and Nexis

reports of what was in the media before, during and after the period Turner was buying. Respondents selected six of the worst stories. Judge Patel selectively picked and chose from that information (two written seven months before Turner began to purchase) in arriving at a decision that Turner was constructively on notice of materials he never read and that Turner was unreasonably buying in face of what was in the media and the marketplace; Judge Patel holding that media stories adequately informed Turner of FCA's financial condition. (App. 34a-35a)

If Turner was constructively on notice and adequately informed by information in the marketplace from the media stories submitted by respondents then it must also follow that these same media stories had also adequately informed the market of FCA's true financial condition.

Yet the market continued to trade FCA common stock for the year that Turner accumulated at a price of $9 dollars on 6/13/86 gradually down to $7.00 by 10/23/86 then reversing and gradually up to $10 by 1/23/87 then gradually down to $7 by 4/23/87. The average price being $8.75 for 67,172,100 shares that traded in the 249 trading days (an average of 269,767 shares per day). (App. 199a-208a)

The logical question becomes:

"Why would the market value an insolvent company with a $2 to $3 billion dollar hole in it at those prices?" if, as held by the courts below, the total mix of information, including media stories, accurately disclosed FCA's true financial condition?

For a District Court Judge to interject selected soft information contained in media stories into a summary

judgment procedure, for the sole purpose of holding Turner constructively on notice of selected negative information, alleged to be what is contained in such stories, is serious judicial error.

The District Court's memorandum states: "The [Turner's] other purchases took place despite a plethora of information existing in the market place tends to indicate that plaintiff was relying more on the greater fool theory...than any optimistic picture of FCA painted by Defendant Popejoy." (App. 43a)

Respondents' "greater fool" theory has no foundation in law as a general defense. It must rest upon fact. Fact finding is a jury function.

If the lower court is ruling that Turner was a fool for buying at the market price in light of information available in the marketplace then the lower court must

also be ruling that the market was a fool for buying the other 67 million+ shares which also traded at an average price of $8.75 during the same year. (App.199-208a)

However a reasonable jury might hold that a clearer statement was that the market was defrauded along with petitioner Turner -- since it is legally presumed that the market had all information, including all the selected negative information cited by the courts below, intelligently processed into the price of FCA securities.

Yet a majority on the split ninth circuit panel erroneously bought into the labyrinth of rationalizations used by Judge Patel to support her ruling. This rational cannot with-stand scrutiny when reviewed in light of the established stare decisis under the fraud on the market theory.

Also, contrary to the District Court's new "Greater Fool" theory, it does not follow from efficient market theory that

the market price of common stock is moved by fools. The stock market cannot be equated with a single investor. Rather, the market embodies the collective wisdom of thousands of traders, with prices typically determined by the bargains struck between the most sophisticated of those traders. See Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826,835 (7th Cir. 1985) ("[t]he price of an actively traded stock reflects the value placed on it by the professional investors who follow a firm closely"). Such traders take into account all information about a stock, but reject much of it as inaccurate, unreliable, or contrary to better intelligence.

The other basic feature of an efficient market is that the market is quick to correct its mistakes. If the price of a stock becomes distorted, traders frequently step in to buy the undervalued stock or sell the overvalued stock until

the proper price is restored. See T. Copeland & J. Weston, Financial Theory and Corporate Policy 211 (1979) ("[c]apital market efficiency relies upon the ability of abitraguers to recognize that prices are out of line and to make a profit by driving them back to an equilibrium value"). Spurred by the incentive to maximize profits or minimize losses, sophisticated traders compete intensively to ferret out information about underlying events and values.

Based upon an efficient markets best efforts to ferret out information about FCA from all the information available to it from August 31, 1984 when FCA Stock traded at $5, through the days, weeks and months, and for the entire year of 1985, up to and including March 31, 1986, as the stock price continued to rise until it traded at $17, The efficient market made a price, upon the New York Stock Exchange, on FCA

stock, a Fortune 500 Company. This market assimilated the 10-K and 10-Q Reports filed by FCA, and the statements of Defendant Popejoy about its recovery. Further it had assimilated all the news stories referred to by the lower courts, magazines, advisory services, and all other media reports written about FCA during that time.

Also when FCA began to fall from the $17 high on March 31, 1986 it fell after FCA announced additional loan loss reserves due to falling real estate values in condominiums the company owned which were revalued as apartments. This was an economic condition not losses due to fraud. The market still assumed that FCA had sound assets which it had thoroughly examined but was continuing to experience losses due to economic conditions. (App. 79a; 216a)

"See Lipton v. Documation,Inc. 734F.2d 740,748 (Call 1984), cert. denied, 469 U.

S. 1132 (1985). The presumption is also supported by common sense and probability. Recent empirical studies have tended to confirm Congress' premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations. It has been noted that 'it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?' Schlanger v. Four-Phase Systems Inc. 555 F.Supp. 535, 538 (SDNY 1982). Indeed, nearly every court that has considered the proposition has concluded that where materially misleading statements have been disseminated into an impersonal, well developed market for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed."

"In an open and developed market, the dissemination of material misrepresentations or withholding of material information typically affects the price of the stock, and purchasers generally rely on the price of the stock as a reflection of its value"; Blackie v. Barrack, 524 F.2d 891, 908 (CA9 1975) ("[T]he same causal nexus can be adequately established indirectly, by proof of materiality coupled with the common sense that a stock purchaser does not ordinarily seek to purchase a loss in the form of artificially inflated stock"), cert. denied, U. S. 816 (1976).

And if, as Turner alleges and the probative evidence supports, it was secretly known to respondents that these assets were worth $2 to $3 billion dollars less than they were being carried for on FCA's books then it follows that FCA was bankrupt at all times and the price of FCA

stock was artificially inflated when reflecting a value of $7 to $10 dollars per share during the year that Turner accumulated stock. In fact, if Turner's allegations are true then rather than a net stock holder equity of $229 up to $320 million in the consecutive periods reported, at all times FCA had a negative net worth of between $2 to $3 billion dollars, and the stock was worthless. (App. 191a-198a)

The facts as now revealed show this was true since the FSLIC admitted a loss to its fund of $1.7 billion after seizing American and selling it in a pass through sale where their loss was computed after factoring into their admitted loss the fact that they kept 30% of the ownership.

The efficient market never got the true facts so it steadily down valued FCA common stock, with each report of losses due to whatever FCA reported. FCA reached .08 cents per share after FCA filed bank-

ruptcy in 1988. Prima facia evidence that the market works and does not value a stock at $7 to $10 dollars a share based upon "the greater fool theory" as rationalized by the lower court in its order as a possible reason for Turner's purchases.

III. THE COURTS BELOW FAILED TO FOLLOW THIS COURTS RULE THAT THE RECORD MUST BE READ AND THE EVIDENCE VIEWED IN A LIGHT MOST FAVORABLE TO THE PARTY DEFENDING AGAINST A SUMMARY JUDGMENT MOTION.

Judge Patel's memorandum cites case support for the very thing she denied Turner. As she held in her own memorandum, "The inference to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. T.W. Elec. Serv., 809 F.2d at 631." (App. 31a)

And if that rule were followed, as

shown above, she must find that the total mix of media stories favors Turner's interpretation of what they meant. Turner bought at a market price arrived at after the market assessed the media stories and had placed a value on FCA stock. A reasonably jury could find that not only was Turner not constructively informed of what Judge Patel interpreted the selected media stories to say, but also the market was not informed of what Judge Patel interpreted the stories to say.

As the Supreme Court held in TSC Industries a determination of materiality presents mixed questions of law and fact. Thus, it would be a rare case when " 'reasonable minds cannot differ' on the question of materiality" to the extent that it could be established as a matter of law on summary judgment. 426 U.S at 450 (quoting Johns Hopkins University v. Hutton, 422 F.2d 1124, 1129 (4th Cir.

1970), cert. denied, 416 U.S. 916 (1974)).

The Ninth Circuit argument fails to explain why FCA stock price trippled between 1985 and 1986 if its financial condition was accurately known to the market; or the market price of FCA during the year that Turner was purchasing. Also why they are not violating this courts rule that a judge is not to weigh evidence in a summary judgment proceeding.

Further; the Memorandum and Order of the Lower Courts clearly shows that the Court extracted only those parts of the media stories that could be viewed as negative to petitioner Turner's case. The full context of the risky-lowest safety rating disclosure, for example, is:

"These Shares are risky. FCA's loan portfolio favors fixed rate mortgages by a ratio of almost nine to one. A continued low interest rate environment could drive

earnings to near record levels and lead to exceptional capital gains by decades end. Conversely the consequences of a sudden surge in interest rates (which we're not forecasting) could be devastating . . ." (App. 209a-212a) (App. 3a; 11a)

This services' lowest saftey rating was because of the risk of interest rates rising. The Service did not say there was a risk was that FCA has a portfolio of fraudulently generated assets comprised of improvident loans and improvident transactions, made with full knowledge that the projects would not support themselves economically and with interest rate reserves paid in advance to stretch out to the future the expected foreclosures. Transactions requiring a daisy chain of subsequent improvident transactions for years as they struggle to turn these fraudulent assets into real assets or to dispose of them in "cash for trash"

transactions. (App. 163a-176a)

The net effect of the lower courts rule is if the stock is a "risky" investment an investor is not entitled to all material facts to assess them before making investment decisions.

The lower courts err in this case by viewing the evidence in a light most favorable to the party moving for summary judgment -- in direct opposition to this courts rule that the evidence be viewed in a light most favorable to petitioner, who was defending against summary judgment.

The message is clear; the party who defended against the motion for summary judgment will have the advantage of the court's reading of the record in the light most favorable to him, will have his allegations taken as true and will receive the benefit of the doubt when his assertions conflict with those of the movant. Bishop v. Wood, 1976, 96 S. Ct.

2074, 426 U.S. 341, 48 L. Ed. 2d 1076.

IV. THERE IS DIRECT EVIDENCE OF BIAS BY THE DISTRICT COURT AFFECTING PETITIONERS' CONSTITUTIONAL RIGHT TO DUE PROCESS. THE APPEALS COURT ERRONEOUSLY FAILED TO ADDRESS THIS QUESTION OR TO RULE ON IT.

The transcript of the September 18, 1989 hearing on the motions to dismiss set the tone for the gauntlet Petitioner has been forced to run while trying to use the justice system to redress his claims against respondents.

THE COURT: "Why are you here? Why don't you leave it to the attorneys in Los Angeles who are litigating on behalf of the class? I am not going to try a parallel action up here when there is one down in L.A." P4-L16

THE COURT: "Why should you do any better

than any other member of the class?"
P5-L1

MR. TURNER: "Well, I claim that this class action settlement is not for the benefit of the shareholders at all. It's for the benefit of the FSLIC and the Federal Home Loan Bank, all of whom are having themselves exempted and indemnified or released by this class settlement." P5-L3

THE COURT: . . . "It doesn't make sense to allow one shareholder to run off and be litigating and running up the cost of litigation for the court and the parties when that person is a member of a class. Have you opted out of that class?" P5-L21

THE COURT: . . ."I think probably the best way to get to the heart of this case and the soonest, most expeditious is to have you take the plaintiff's deposition and pin

down exactly what representations he does claim he relied on and get the kind of specificity that is necessary.

Find out whether his reliance was reasonable, and all those other good things that you need to know in order to know if there are valid claims here. And then come back here with motions that really, I guess, should be recharacterized as motions for summary judgment." P13-L1

Petitioner certainly agrees that it would be more convenient to read the record in a way that doesn't let one lone share holder "run off and run up the cost of litigation" when there is a class action he could join. However our system of justice is at its finest when protecting individual rights guaranteed by our constitution. Convenience and/or expediency for the Court is secondary to an individual's right to a fair procedure in a federal court.

Petitioner's 7th amendment rights to use the justice system to have his case heard upon the merit by a jury are severely strained, if not broken, when the courts below interject themselves between him and his day in court by subjective interpretations of what was in the marketplace or what selective media information disclosed when the engine that fueled such finding may have sprung from judicial bias.

Enforcing this posibility -- the respondents were given court ordered discovery to develop their media report theory of the case. Petitioner Turner was denied discovery and could not develop and perfect the probative evidence he had submitted.

We do not have two drinking fountains of justice, one for a politically correct case and one for cases where the FHLBB finds itself in such a bind from the fraud and abuse in the S&Ls that it regulates that it conspires to keep the largest S&L

open and operating (and its stock trading) even though it is insolvent, issuing letters that misled the market for over 3 years, allowing thousands of innocent securities purchasers to believe the S&L had $320 million net worth when it was secretly known to have a "$2 to $3" billion dollar "hole in it".

For the courts to strictly enforce securities law is just and moral. Judicial activism serving to protect malfeasance by the FHLBB is neither just or moral.

V. THE MEMORANDUMS OF THE LOWER COURTS CONTAINS SUCH EGREGIOUS ERROR THAT IT OFFENDS JUSTICE TO ALLOW IT TO STAND.

The District Court held "In addition plaintiff claims the losses as demonstrated by the proof of loss far exceeded defendant's disclosures. This is not supported by the proof of loss, however. The total

of the sums referred to in the document is sub-stantially the same as the amounts revealed in the 10-K and the public disclosures. Thus, plaintiff's alleged reliance on the Proof of Loss statement is unconvincing since such omissions cannot even be proven to have existed."
(app. 38a)

However Petitioner presented an example of one loan he knew about. That "Cannery Row" Loan had a loss reserve of $2.5 million July 1, 1987 and $21.4 million a year later after American was seized and sold to Bass. So it jumped from 2.5 million to 21.4 million in a year - simply a question of when you decided to take out a pen and write it down to the value you always knew it to be. This was only a $42 million loan to start so they lost interest and one-half the principal. (163a-190a)

"This loan, listed in schedule 2 under

Improvident Loans, page 4, [hand numbered 136] as "Rossi (cannary Row). Loan Number 020-1006563. Total loss/loss reserve through 1985, $750,000. Yet the loss was $21 million. If one used this under report of losses as a templet for the entire portfolio of improvident loans the actual losses would be multiplied by the factor obtained from the actual $21.4 million loss divided by $750,000 reported loss. This factor is 28.5. Or the loss was actually 28.5 times the reported loss. So if all loan losses in the "Proof of Loss" were understated by the same factor the loan losses would be $422 million reported in March 1985 times the understated factor of 28.5 or a total of $12.02 billion dollars.

However from simple logic we know the additional losses to FCA above the $422 million respondents claim reported the full financial impact (if not the content) of the "proof of Loss" would be:

"a) somewhere between the $1.7 billion dollar loss that the FHLBB admitted as it seized and sold American in a pass through sale to Bass (incredibly keeping 30% of the company for itself)

b) and the $4 billion estimated in the significant case write up contained in the SF-FHLB files." (App. 194a)

Further the district court wrongly held: "The details of the Knapp management misdeeds were well documented in various financial periodicals as well as in FCA's 10K report and financial statements." (App. 37a; however See 1985 10K excerpts, App. 75a; the Proof of Loss excerpts App 162a; and generally App. 75a-234a)

From all the foregoing it can be seen that basis for granting summary judgment was improper in that the courts below

failed to carefully analyze the claims and submissions of petitioner, and the controlling legal issues. In poorly reasoned opinions they wrongly concluded, as within the meaning of Rule 56(c) Fed. R. Civ. P., that the respondents were entitled to, and granted them, summary judgment based upon incorrect findings and conclusions of law.

- The lower courts improperly weighed evidence to arrive at their decisions, which is properly the role of the trier of fact. Turner is entitled to have a jury weigh the evidence in a civil matter as provided by the seventh amendment.

- The lower courts err in holding that Petitioner was constructively on notice of the content selective media stories he did not read, in publications he did not subscribe to -- two of which were written

seven months, and one 40 days, before he even began investing in the market.

- The lower court's view of the evidence was subjective, and reasonable minds could differ as to what the evidence shows.

A petition should be granted to resolve the questions raised above so that securities law, and established stare decisis in summary judgment issues as well as securities law, is being uniformly enforced in this circuit.

Petitioner Turner's rights to a fair procedure in a federal court is the quintessential foundation upon which the judicial system is built. Preserving that right is more important to society than any benefit derived from the lower courts reading the evidence so as to protect an agency of government from accountability

for its own misfeasance and malfeasance in the S&L scandal surrounding FCA/American.

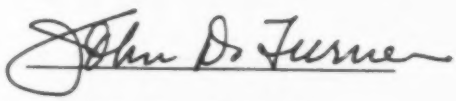
That Petitioner's suit go forward is further important to society as a necessary private action assisting in policing the securities market to insure that it remain a fair and honest market. The integrity of the securities market is at least equal to any alleged public purpose that may have been achieved by the FHLBB keeping an insolvent S&L operating for the four years American was kept open, while they tried to deal with a problem they feared would have bankrupted the FSLIC had it been required to make good on its insurance guarantees. (FCA was largest S&L in U.S.)

"Summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of overkill in its use."

If, in truth, this case has been decided through a thinly veiled agenda of judicial activism, it results in not only financial loss but a disfranchising of a citizen's constitutional rights to due process and a jury trial upon the merit, and it serves no just or good societal purpose. Petitioner is entitled to his day in court on the merits with a jury as fact finder.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.



Dated: May 27, 1992
San Jose, California

John D. Turner
Petitioner